SUPREME COURT, U. S.

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JUN 8 19[illegible]

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IN THE

Supreme Court of the United States

October Term, 1970
No. 1663

NORMAN KRASNA,

Petitioner,

vs.

ELIZABETH S. DAVIES, Executrix of the Estate of Valentine Davies, Deceased,

Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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A.

1. Respondent's Brief in Opposition, whether designedly or by inadvertence, gives the impression that Krasna had appropriated a "screenplay" which Davies had submitted in confidence,[1] and, on that factual as-

[1]See the following extracts from Respondent's Brief in Opposition:

". . . alleges appropriation and use by defendant of Valentine Davies' (now deceased) screenplay and the ideas embodied and expressed therein. . ." (p. 2).

"It is not a case involving an 'abstract' idea."

". . . the submission of Valentine Davies' unpublished literary works. . ." (p. 3).

". . .which was later amended to state a cause of action for breach of a confidential relationship in the use and appropriation of his screenplay." (p. 4).

"The federal question assertedly raised by the defendant is that plaintiff's screenplay submitted in confidence to the defendant was a 'mere' idea. . . ." (p. 6).

(This footnote is continued on the next page)

sertion is based the principal thrust of his argument that Davies' screenplay—his literary "work"—falls within the protection of Section 2 of the Copyright Act (17 U.S.C. Section 2) relating to the author's rights "at common law or in equity" in connection with an "unpublished work." As a consequence, Respondent contends that the decision below does not involve any substantial federal question, does not contravene any federal policy of preemption, and does not contravene the policies set forth in *Sears, Compco* and *Lear.*

2. Since this case is at the pleading stage, there can be no question about what facts are in issue. Respondent has clearly misstated what the case is about. We need only look at the pleadings to demonstrate that the case *does not involve an alleged appropriation of a screenplay or unpublished writings.* It involves, as we have stated in our Petition, no more than an alleged appropriation of a plot or literary ideas.

(a.) Davies' "Amendment to Second Cause of Action of Second Amended Complaint for Damages" [Clk. Tr. [No. 28574] pp. 17-25], after alleging the submission of a screenplay, alleges (Par. VIII) (*id.*

"Secondly, it totally disregards that the screenplay in question was never published by Valentine Davies and that he never authorized publication by the defendant." (p. 8).

"In conclusion, since plaintiff's screenplay is an unpublished work falling within the express provisions of Title 17 U.S.C. Section 2 which preserves state protection for common law rights and rights in equity, plaintiff's complaint pleading an equitable cause of action for unjust enrichment in breach of a confidential relationship does not conflict with the federal preemption doctrines enunciated in *Sears, Compco* and *Lear.* . . ." (p. 14).

"The equitable balance has been expressed in the Copyright Act which prohibits copying and appropriation of unpublished writings and grants the writer or author a right to damages and compensation. Title 17 U.S.C. Section 2." (p. 16).

p. 22) that Davies entrusted to Krasna for "limited and confidential use . . . plaintiff's said central theme and dramatic core concept" and (Par. IX) (*id.* p. 23) that Krasna "knowingly used and adopted plaintiff's said central theme and dramatic core concept . . ."

(b.) The following extracts from the Joint Pre-Trial Statement confirm our version of the case. [See Clk. Tr. pp. 36]:

"THE PLEADINGS

"This action proceeds upon the Seconded Amended Complaint and Amendment thereto, and defendant's Answer.

Plaintiff's First Cause of Action is for breach of an implied contract to pay for an idea, as noted hereinabove.

Plaintiff's Second Cause of Action is based upon an alleged breach of trust with respect to the alleged use by defendant of the said idea."

[See Clk. Tr. p. 39]:

"THE ISSUES

"A. Did defendant Norman Krasna invent and create the idea and central theme employed by him in the play 'WHO WAS THAT LADY I SAW YOU WITH?' prior to the time Valentine Davies claims he invented and created the idea, central theme and dramatic core of his stories 'LOVE MUST GO ON' and 'LANGUAGE OF LOVE'?

B. Did Valentine Davies invent and create an idea, central theme and dramatic core of great value in his stories 'LOVE MUST GO ON' and 'THE LANGUAGE OF LOVE'?

C. Did Valentine Davies, through his agents or otherwise, submit the said property to defendant?

D. Did defendant receive the said story or the idea, central theme and dramatic core thereof?

E. Did defendant use his own idea, central theme or dramatic core in the play 'WHO WAS THAT LADY I SAW YOU WITH?'?

F. Did defendant use Valentine Davies' idea, central theme or dramatic core as alleged in his play 'WHO WAS THAT LADY I SAW YOU WITH?'?"

(c.) Thus, there never has been an issue in this case involving alleged appropriation of a screenplay or an unpublished literary work and the case involves only, in the words of the Court below, an alleged appropriation of "literary ideas." The court below summarized the case as follows (Appendix A to Petition for Writ of Certiorari, p. 2):

> "The pleadings were as follows: Plaintiff alleged that Valentine Davies created certain literary ideas and that he submitted them to Norman Krasna, a playwright and screenwriter, on or about December 6, 1951; that Krasna agreed to pay Davies if he used them; and that Krasna did use them but did not pay Davies. Krasna, on the other hand, alleged that Davies never submitted his story to Krasna in 1951, or any other time, and that Krasna conceived of the story a full year before Davies allegedly conceived the story."

We submit that there can be, and in this Court there ought not to have been, any question concerning the nature of Respondent's pending cause of action:

relief in equity is being sought for the alleged appropriation of a literary idea—not for an alleged appropriation of a screenplay.

B.

The Petition for a Writ of Certiorari, framing the questions on the basis of a true version of the facts and on the basis of what are the issues for decision, and in posing the federal questions which this Court should consider, made only a passing reference (Footnote 7, p. 11) to the premise that under Section 2 of the Copyright Act and under California's common law copyright, "a literary theme or plot" is not subject to protection.

We did not, and could not, anticipate that Respondent, after casting the case in a false light, would base his entire opposition on the assertion that he had a protectible copyright interest. We shall, accordingly, amplify our succinct statement of the law to demonstrate that Respondent does not have a protectible copyright interest.

C.

Neither the Copyright Act, in general, as to published works, or Section 2, in particular, as to unpublished works, affords any protectible rights to mere literary ideas, including ideas for themes, story plots, or "dramatic cores", except as those ideas are embraced in and are given concrete literary expression in a work. Article I, Section 8, Clause 8 of the United States Constitution grants power to the Congress to secure "to Authors . . . the exclusive right to their . . . Writings. . . ." Section 2 of the Copyright Act, on which Respondent relies, is limited to preserving rights in an "unpublished work." And the Courts have agreed that a mere idea, as

distinguished from the expression of the idea, is not protectible either under the Copyright Act (see: *Holmes v. Hurst,* 174 U.S. 82, 86 (1899); *Kalem Co. v. Harper Bros.,* 222 U.S. 55, 63 (1911); *Dymow v. Bolton,* 11 F. 2d 690, 691-692 (2 Cir. 1926); *Nichols v. Universal Pictures Corp.,* 45 F. 2d 119, 121 (2d Cir. 1930)) or under common law (see: *Fendler v. Morosco,* 253 N.Y. 281, 171 N.E. 56, 58 (1930); *Weitzenkorn v. Lesser,* 40 Cal. 2d 778, 788, 256 P. 2d 947 (1953)).

It is not necessary to explore the precise line to be drawn, in the abstract, between "an idea" and "the expression of an idea" for the California law regarding the copyright protection afforded to unpublished works is clear. It is embodied in Section 980 of the California Civil Code (set forth in the Appendix to the Petition for a Writ of Certiorari, p. 13) which grants a protectible right only "in the representation or expression" of any "composition in letters or art." The Supreme Court of California in *Weitzenkorn v. Lesser, supra,* at page 789, made it clear that in California at the present time and at all times relevant to this case, "the idea alone, the bare, undeveloped story situation or theme, is not protectible," in contrast to the situation prior to the enactment of Civil Code Section 980 in its present form when California did grant protection to (p. 788) " 'the basic dramatic core' ".[2]

If the Respondent claims that his idea for a "dramatic core" is protected under common law copyright of Cali-

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[2]The Court was there quoting from *Golding v. R.K.O. Pictures, Inc.,* 35 Cal. 2d 690, 697, 221 P. 2d 95 (1950). In *Weitzenkorn, supra,* the Court noted (p. 788) that the former California rule, in granting "protection to an idea" transcended "the normal bounds of common law copyright," and (p. 789) "California now accepts the traditional theory of protectible property under common law copyright."

fornia, he plainly misstates the law. If the Respondent claims that it was his "representation or expression" of his literary idea for which protection is sought in this case, he plainly misstates what are the facts.

It is significant that neither the Court below, or the Court in the prior opinion in this case (245 Cal. App. 2d 535, 546-548), even intimated that Respondent's "equitable" cause of action was based on common law copyright (and could not in the light of *Weitzenkorn, supra*). Instead, both opinions make it clear that what was dealt with are "ideas" and the question whether equity would protect an alleged breach of confidence because of the alleged appropriation of those ideas.

In the light of the foregoing, it is clear that, in fashioning an equitable rule which would protect against an alleged appropriation of "ideas", California does not afford copyright protection. "Where only the plaintiff's idea has been appropriated protection must be found, if at all, on a theory other than copyright infringement."[3]

The issue, accordingly, is exactly as we stated it in our Petition for a Writ of Certiorari (p. 2). We there

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[3]Nimmer on Copyright (1970) §143.11, p. 626. It should be noted that Nimmer devotes an entire chapter (Chapter 15) to "The Law of Ideas" which has developed outside the realm of copyright law. It should also be noted that Nimmer (p. 734) specifically discusses the question of federal preemption in the area of ideas in view of the *Sears, Compco, Lear* principles. While the author concludes, in a situation where there has been a consensual arrangement (express or implied) that there ought not to be preemption, he does not base his conclusion on the premise, as would Respondent, that ideas have copyright protection. Nor does he consider the situation, which is the issue posed here, whether, in non-consensual circumstances (in this case the jury, its verdict affirmed on appeal, has already determined that there was no agreement, express or implied, between Krasna and Davies), the states should be free to protect non-copyrightable ideas.

stated, correctly, that Plaintiff's "idea for a bare literary plot" was "not copyrighted and not protectible under federal copyright law or under common law copyright." We framed the question, correctly we submit, to be:

> ". . . whether, under circumstances where there has been no agreement to compensate, California may validly fashion a rule of law which grants Plaintiff a monopoly against the copying of his idea and obligates the Defendant to compensate the Plaintiff for the use of an otherwise free and non-protectible literary plot."

Conclusion.

For the reasons stated in the Petition for a Writ of Certiorari and the additional considerations stated herein, the petition should be granted.

Respectfully submitted,

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